

No. 85-1347

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

GEORGE F. RITCHIE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF PENNSYLVANIA.

BRIEF OF *AMICUS CURIAE* COUNTY OF ALLEGHENY, PENNSYLVANIA ON BEHALF OF ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES IN SUPPORT OF PETITIONER

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i.

Question Presented for Review

Does the Sixth Amendment to the United States Constitution require that a defendant accused of sexually assaulting his minor daughter be granted unlimited access to Allegheny County Children and Youth Services case records regarding the child victim when such access would conflict with vital state interests in preserving the confidentiality of such case records?

ii.

TABLE OF CONTENTS.

	Page
Question Presented for Review.....	i
Table of Authorities.....	iii
Statement of the Interest of the <i>Amicus Curiae</i> , Allegheny County Children and Youth Services ..	1
Argument.....	3
(A) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Critical Goal Of Identifying Abused Children And Protecting Them From Further Abuse....	3
(B) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Commonwealth's Interest In The Rehabilitation Of Child Abuse Victims And The Preservation Of Families.....	5
(C) The Sixth Amendment Does Not Require That Defense Counsel Be Given Access To The Case Service Records Of Allegheny County Children And Youth Services In This Case	7
Conclusion	12

iii.

Page

TABLE OF AUTHORITIES.

CASES:

Davis v. Alaska, 415 U.S. 308 (1974)	8,9,10
McCray v. Illinois, 386 U.S. 300 (1967).....	8
Smith v. Illinois, 390 U.S. 129 (1968)	10
United States v. Nixon, 418 U.S. 683 (1974)	8
Washington v. Texas, 388 U.S. 14 (1967).....	8,10

STATUTES:

11 P.S. §2201 <i>et seq.</i>	1
11 P.S. §2202	2,5
11 P.S. §2204	4
11 P.S. §2215(a)(9) and §2215(c)	11
11 P.S. §2216(a)	2
11 P.S. §2216(d)	6
11 P.S. §2217(1) (4) (6) and (7)	3
11 P.S. §2219(a)	4

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**Statement of the Interest of the *Amicus Curiae*,
Allegheny County Children and Youth Services**

The Commonwealth of Pennsylvania enacted the Child Protective Services Law in November, 1975. 11 P.S. §2201 *et seq.* The stated purpose of the law was to

encourage more complete reporting of suspected abuse of children, to protect abused children from further abuse, to provide rehabilitation services to the children and parents involved, and, wherever appropriate, to stabilize the family. 11 P.S. §2202.

Because the entire focus of this Legislation is the protection of children and the provision of rehabilitation services to children and their families, the responsibility for fulfilling the purposes of the Act was not lodged in any law enforcement agency, but in a "Child Protective Service" to be established in each Children and Youth Service agency in every county in the Commonwealth of Pennsylvania. 11 P.S. §2216(a).

Allegheny County is a political subdivision of the Commonwealth of Pennsylvania and has an estimated population of 1,430,375. Allegheny County Children and Youth Services (hereinafter "CYS") is the County agency charged with responsibility for dependent, neglected and abused children. It maintains a Child Protective Service department to carry out the terms of the Child Protective Services Law.

CYS has a substantial interest in the matter before this Honorable Court because the case records at issue in this case are its records. The decision of the Pennsylvania Supreme Court at issue would allow a defense attorney unfettered access to Child Protective Service records of any child that is the subject of an abuse report or any family that has received case work service from CYS Child Protective Service.

Moreover, to the extent that the decision of the Pennsylvania Supreme Court interferes with CYS' statutory duty to carry out the goals of the Child Protective Services Law, CYS has a substantial interest in the matter before the Court.

ARGUMENT

(A) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Critical Goal Of Identifying Abused Children And Protecting Them From Further Abuse.

One of the shocking revelations of recent years is that physical and sexual abuse of children is tragically widespread, and that, until recently, it has usually gone undetected and unremedied. The success of the Child Protective Service Law in identifying these helpless victims and protecting them from further abuse is one of the public policy triumphs of the last decade.

In short, the Child Protective Services Law requires a Child Protective Service to receive reports of abuse on a 24-hour, 7 day-a-week basis. The Act further requires each Child Protective Service to commence investigation of each report of abuse within 24 hours, to make a determination within 30 days of whether the reported abuse is "founded," "indicated," or "unfounded," and to take any necessary steps to protect any abused child from further abuse. 11 P.S. §2217(1) (4) (6) and (7).

According to the most recent report of the Pennsylvania Department of Public Welfare (hereinafter "DPW"), the DPW's "Childline" abuse reporting service and the Child Protective Services of the various counties received 20,980 reports of suspected child abuse in 1985. Of these, 7,724 or 36.8% were substantiated. This represents a tremendous increase in the reporting of suspected abuse of children over 1976, the first year following enactment of the Child Protective Services

Law, during which only 6,415 reports of suspected abuse were received, of which 44.4% were substantiated.¹

In 1985, Allegheny County's Child Protective Service alone received 2,002 reports of suspected abuse, of which 750 or over 37% were substantiated.

The key to the effectiveness of the reporting system is the assurance that reporters will remain anonymous. Amendments to the Child Protective Service Law adopted in 1982 specify certain professionals, such as medical and school personnel, who are legally obligated to make reports of suspected abuse. 11 P.S. §2204. Only 54.1% of the reports of suspected abuse, however, are received from this source. The balance of reports, or 45.9%, come from "non-mandated reporters", usually family members, family friends or neighbors.² Thus, these non-mandated reporters are crucial to the successful functioning of the child abuse reporting system.

The Pennsylvania Supreme Court's decision will effectively destroy the incentive of non-mandated reporters to report suspected child abuse because it virtually guarantees that the name of the reporter will eventually be revealed to the perpetrator. Because the Child Protective Service Law requires every complaint of child abuse to be relayed to the appropriate child protective service for investigation, the records of that

¹ 1985 Child Abuse Report of the Commonwealth of Pennsylvania Department of Public Welfare Office of Children, Youth and Families, pp. 20-21. (The Child Protective Services Law requires the Department of Public Welfare to submit an annual report to the Governor and State Assembly on the operation of the Commonwealth's central register of child abuse and the Child Protective Services of the various counties, including full statistical analysis on the reports of suspected child abuse. 11 P.S. §2219(a).)

² 1985 Child Abuse Report, *supra*, p. 8.

service necessarily contain the name of the reporter. Ironically, because of the Pennsylvania Supreme Court's decision, the more serious the abuse, the more likely that the reporter's name will be revealed, due to the increased possibility that a criminal prosecution will result. Thus, the greater the danger to the child, the greater the incentive for the family member, friend or neighbor *not* to report the suspected child abuse.

The stronger the guarantee of anonymity for reporters of suspected abuse, the more likely non-mandated reporters, such as family members, friends or neighbors of the abused child, will report suspected abuse. The more likely that their names will be revealed to the suspected perpetrator, the less likely they will be to make a report.

By making a non-mandated reporter's anonymity less likely, the decision of the Pennsylvania Supreme Court clearly undermines the vital interest of the Commonwealth and of CYS in identifying and in protecting children from physical and sexual abuse.

(B) The Decision Of The Pennsylvania Supreme Court Seriously Undermines The Commonwealth's Interest In The Rehabilitation Of Child Abuse Victims And The Preservation Of Families.

The stated goals of the Child Protective Services Law include providing rehabilitation service to children and his or her parents. 11 P.S. §2202. This rehabilitative element of the Child Protective Services Law is almost as important as protecting the child from abuse. Its purpose is to enable a child and his or her family to cope with the trauma of abuse and to preserve the stability of the family where possible.

This goal explains the Child Protective Services Law's express requirement that child protective services "treat" as well as prevent child abuse through "multi-disciplinary teams, instruction and education for parenthood, protective and preventive social counseling, emergency caretaker services, emergency shelter care, emergency medical services, and the establishment of groups organized by former abusing parents to encourage self-reporting and self-treatment of present abusers." 11 P.S. §2216(d). Obviously, these are impossible goals unless victims, parents and even abusers feel they are free to talk honestly with a social worker or counselor about incidents of abuse.

One of the main difficulties Allegheny County Children and Youth Services has faced in dealing with the child abuse problem has been the reluctance of children to admit abuse. Even when children admit abuse, they often initially understate the extent or frequency of the abuse. It may take frequent or extended conferences with a caseworker or counselor before the full details of the abuse are revealed.

This reluctance is not only a barrier to discovering abuse or confirming reports of abuse, but it prevents effective counseling and rehabilitation of the victim. One of the major reasons for a child's reluctance to discuss abuse is the fear that his or her statements will be revealed to the abuser or that the child will be punished for his or her statements.

Nothing is more likely to guarantee that children will be discouraged from reporting or seeking help from a caseworker or counselor for abuse than the knowledge that their statements might be revealed to the abuser through the criminal justice process or that they will be subjected to hostile cross-examination about their statements.

It is ironic that at a time when legislatures, including the Pennsylvania Legislature, are taking steps to protect child witnesses in criminal trials for child abuse through testimony by closed-circuit television and by other means,³ the Pennsylvania Supreme Court's decision guarantees that children will receive no protection in the social service context, in which a child's participation is aimed at helping the child recover emotionally from the trauma of abuse.

Just as the Pennsylvania Supreme Court's decision seriously undermines the important goal of identifying abused children and protecting them from further abuse, it effectively destroys the Child Protective Services Law's goal of providing rehabilitative services to an abused child and his or her family by opening confidential case records, including statements made as part of the rehabilitation process, to a defense lawyer in a criminal trial.

(C) The Sixth Amendment Does Not Require That Defense Counsel Be Given Access To The Case Service Records Of Allegheny County Children And Youth Services In This Case.

Given the deleterious effect the Pennsylvania Supreme Court's decision will have on the Commonwealth's goal of identifying abused children, protecting them from further abuse and providing rehabilitation services to the children and their families, the Sixth Amendment does not require opening Allegheny County Children and Youth Services' records to review by defense counsel.

The Sixth Amendment of the United States Constitution guarantees defendants in criminal prosecutions the right to confront and cross-examine

³ 1986 Pa. Legis. Serv. No. 1, Act 1986-14.

witnesses. This Court has repeatedly recognized, however, that this right is not absolute. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Washington v. Texas*, 388 U.S. 14 (1967). Certain constitutional, statutory and common law privileges exist in order to protect relationships of such significance and value of society that they outweigh the interest of society in obtaining any possible evidence disclosed in the context of that relationship.

The test of the validity of these privileges in light of the powerful demands of the Sixth Amendment is a balancing of the society's interest in protecting the relationship, and, in particular, the potential harm that would be done to the existence and value of the relationship by breaching its confidentiality, compared to the importance of obtaining possible evidence. *United States v. Nixon*, *supra*; *McCray v. Illinois*, 386 U.S. 300 (1967).

The interests at stake in this case, interests that can be guaranteed only by protecting the confidentiality of child abuse case service records, are as weighty as any of those protected by recognized privileges, such as attorney-client, priest-penitent and doctor-patient privileges. As in the case of recognized privileges, without the guarantee of confidentiality these interests will be destroyed. For these reasons, the Pennsylvania Supreme Court's reliance on *Davis v. Alaska*, 415 U.S. 308 (1974) is misguided.

In *Davis v. Alaska*, this Honorable Court held that, despite an Alaska statute guaranteeing the confidentiality of the records of juvenile offenders, defense counsel was entitled to use a prosecution witness's juvenile records to show that the witness was unreliable and had an ulterior motive in testifying

against the defendant because the witness was on probation and was concerned that he was a suspect in the same burglary for which the defendant was charged.

This Honorable Court applied the traditional balancing test, measuring the state's interest in preserving the confidentiality of juvenile records against the extremely limited intrusion that would result from allowing their use under the specific circumstances of the case.

Obviously, permitting use of juvenile records under the circumstances existing in *Davis v. Alaska* would allow the vast majority of juvenile records in the State of Alaska to remain confidential. The state's interest in rehabilitation was not seriously undermined by this Honorable Court's decision, which involved the specific records of a specific juvenile in a unique case. Moreover, the importance of the records to the defense in *Davis v. Alaska* was overwhelming, given that they were the sole means of proving the witness's strong personal interest in putting responsibility for the burglary on the defendant.

In contrast to *Davis v. Alaska*, the ruling of the Pennsylvania Supreme Court effectively undermines the confidentiality of records for juveniles who are subjected to such serious sexual and physical abuse that a criminal prosecution results. In contrast to *Davis v. Alaska*, the ruling of the Pennsylvania Supreme Court in the instant case will lead to wholesale opening of the case records to defense attorneys, revelation of the named reporters of suspected abuse, and the use of statements made in the context of rehabilitation and therapy in cross-examination.

Clearly, comparing the potential damage to the societal interests involved, it is hard to imagine two cases more dissimilar than *Davis v. Alaska* and the instant case. The only true similarity is the inconsequential fact that they both involve confidential records and both involve juveniles. In fact, the nature of the confidentiality at issue in the instant case involves confidential communications either by a witness concerning suspected abuse or a child victim to a counselor or caseworker. This interest is much closer to the traditional common law and statutory privileges, which have been sustained by this Honorable Court, than it is to the interest ordinarily protected by keeping records confidential. As with a client and attorney or a penitent and priest, without confidentiality, the communication by reporters to Child Protective Services or by abused children to caseworkers and, in turn, all records of those communications, will disappear. This is in sharp contrast to the records in *Davis v. Alaska*, which were not records of communications or statements, but records of the objective criminal status of the witness.

The other cases cited by the Pennsylvania Supreme Court are equally inapposite. *Smith v. Illinois*, 390 U.S. 129 (1968), involved the extremely limited ruling that the Sixth Amendment to the Constitution entitled defense counsel to ask a prosecution witness his actual name and address during cross-examination. In *Washington v. Texas*, 388 U.S. 14 (1967), this Honorable Court held that a Texas statute that allowed alleged accomplices to testify in favor of the prosecution in a criminal trial but prohibited them from testifying on behalf of the defense was unconstitutional. Neither of these rulings provides any guidance for resolving the issues before the Court in this case.

Moreover, the specific circumstances of this case tip the balance in favor of the Commonwealth and CYS' interest in preserving the confidentiality of the case records of the child victim. As the Pennsylvania Supreme Court noted, the trial court conducted an *in camera* inspection of the case records and found nothing which would assist the Defendant. Additionally, the prosecution never reviewed the records or even requested material or statements from the records.⁴ Finally, the Defendant made only a vague assertion of need for access to the child's case record.

In view of these facts, this Honorable Court should weigh the purely speculative benefit to the Defendant, Ritchie, against the manifest harm to the interest of abused children, and reverse the decision of the Pennsylvania Supreme Court in this case.

⁴ Although recent amendments provide that law enforcement officials are entitled to receive reports of serious physical and sexual abuse, the Secretary of DPW cannot release the name of the reporter of the abuse unless the Secretary determines that disclosure would not endanger that person. 11 P.S. §2215(a)(9) and §2215(c).

Conclusion

For the reasons set forth above, Allegheny County Children and Youth Services joins in the Petition of the Commonwealth of Pennsylvania and requests that the decision of the Pennsylvania Supreme Court be reversed and the verdict of the trial court be affirmed.

Respectfully submitted,

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